

The Presence of Family Members and Others During Attorney-Client Communications: *Himmel's* Other Dilemma

Jeffrey A. Parness*

I. INTRODUCTION

In *In re Himmel*,¹ the Illinois Supreme Court addressed the dilemma that confronted attorney James Himmel, who had been forced to choose between reporting another attorney's misconduct² and maintaining his own client's secret. The high court's pronouncements regarding Himmel's dilemma have been widely read, though not always with pleasure.³ Yet, attorney Himmel faced a second dilemma: How could he accommodate his client's desire to discuss her legal problems with him in the presence of both her mother and her fiancé, while assuring her that their discussions would probably be deemed privileged and thus immunized from compelled disclosure? On this other dilemma, the Illinois Supreme Court said little, noting only that no privilege would be recognized unless the mother and fiancé were

* Professor of Law, Northern Illinois University College of Law; B.A., Colby College, 1970; J.D., University of Chicago, 1974. Special thanks are due to Nick Griswold, my research assistant, and John Austin, one of our school's librarians.

1. 533 N.E.2d 790 (Ill. 1988).

2. Illinois, like most states, requires that an attorney with unprivileged knowledge of another attorney's misconduct to report that misconduct to the appropriate attorney disciplinary commission. See ILLINOIS RULES OF PROFESSIONAL CONDUCT Rule 8.3 (1993). According to one author, California and Kentucky are the only states that do not have provisions requiring attorneys to report the misconduct of their fellow attorneys. Beverly Storm, *Mandatory Reporting of Lawyer Misconduct: Can The Bench & Bar of the Commonwealth Discipline Itself Without It?* 20 N. KY. L. REV. 809, 809 (1993).

3. See, e.g., Ronald Rotunda, *The Lawyer's Duty to Report Another Lawyer's Unethical Violations in the Wake of Himmel*, 1988 U. ILL. L. REV. 977, 991 (noting the lack of clear guidelines for the new duty to report); Richard W. Burke, *Where Does My Loyalty Lie?: In re Himmel*, 3 GEO. J. LEGAL ETHICS 643, 654-55 (1990) (noting that the court's failure to recognize fully the tension between the duty to maintain secrets and the duty to report attorney misconduct is likely to cause confusion). The results of *Himmel* continue to be debated. See, e.g., Carol McHugh, *'Duty to Report' Pits Lawyer v. Lawyer, but Jury Still Out on Results*, CHI. DAILY L. BULL., Nov. 24, 1993, at 1 ("[W]hether the ethical requirement imposed by *In re Himmel* is a scalpel that can excise venal attorneys or an ax too often wielded in litigation warfare remains the subject of debate within the legal community.").

"agents" of Himmel's client.⁴ The court provided neither substantive guidelines nor procedural rules for determining whether such an agency relationship exists. In the hope of aiding those who may face *Himmel*'s other dilemma, this article will analyze who can be considered an agent of an individual client for the purpose of attorney-client communications.⁵

II. *HIMMEL* ON THE AGENTS OF CLIENTS

In *Himmel*, the Administrator of the Illinois Attorney Registration and Disciplinary Commission ("the Commission") charged attorney James Himmel with violating state professional conduct rules by failing to disclose to the Commission information concerning another attorney's misconduct.⁶ In part, Himmel defended his actions by asserting that he only learned of the misconduct through information his client, Tammy Forsberg, communicated to him. Therefore, Himmel argued, no obligation to disclose arose due to the privilege accompanying attorney-client communications. The Illinois Supreme Court ruled against Himmel and found that he "failed in his duty to report" misconduct.⁷ Citing *People v. Williams*,⁸ the court held that

4. *Himmel*, 533 N.E.2d at 794.

5. Of course, establishing an agency relation for corporate clients is quite different and subject to much disagreement. Compare *Consolidation Coal Co. v. Bucyrus-Erie Co.*, 432 N.E.2d 250, 257 (Ill. 1982) (accepting control-group test for corporate agency) with *Upjohn Co. v. United States*, 449 U.S. 383, 397 (1981) (rejecting control-group test).

6. *Himmel*, 533 N.E.2d at 791. Himmel was charged with not reporting misconduct that he discovered in the course of representing his client, Tammy Forsberg. *Id.* Forsberg had been represented previously by attorney John Casey who had successfully pursued a settlement for Forsberg in a personal injury action. *Id.* After receiving the settlement funds for Forsberg, Casey converted them. *Id.* Forsberg informed Himmel of Casey's actions and, after investigating and establishing that Casey had indeed converted Forsberg's funds, Himmel drafted a settlement agreement between Casey and Forsberg in an amount exceeding the amount due Forsberg under the personal injury settlement. *Id.* The settlement with Casey provided that Forsberg would not initiate any criminal, civil, or attorney disciplinary action against Casey. At no time did Himmel notify the Attorney Registration and Disciplinary Commission of Casey's misconduct. *Himmel*, 533 N.E.2d at 791.

The Administrator of the Commission filed a complaint against Himmel for failing to report Casey's misconduct in violation of Illinois' reporting provision, ILLINOIS CODE OF PROFESSIONAL RESPONSIBILITY Rule 1-103(a) (1987). *Himmel*, 533 N.E.2d at 791. The Hearing Board found that Himmel was indeed in violation of Rule 1-103(a), but it recommended only a private reprimand. *Id.* at 792. Upon appeal by the Administrator, the Review Board found that, for a number of reasons not important to this article, Himmel had not violated Rule 1-103(a). The Administrator then appealed to the Illinois Supreme Court. *Id.*

7. *Himmel*, 533 N.E.2d at 795.

8. 454 N.E.2d 220 (Ill. 1983), *cert. denied*, 466 U.S. 981 (1984).

the information Himmel had obtained from Forsberg was not privileged because it had been voluntarily disclosed by Forsberg in the presence of third parties who were not Forsberg's agents.⁹ The high court did not explain why the third parties, Forsberg's mother and fiancé, could not be considered her agents. Thus, the *Himmel* court left a critical question unanswered: Was the agency label inappropriate because the mother and fiancé did not fit within the relevant substantive criteria, whatever these were, or because there was insufficient, if any, evidence that Forsberg's mother and fiancé were indeed her agents?

A review of the Illinois Supreme Court's decision in *Williams* offers little insight into the rationale behind the *Himmel* court's agency determination. In *Williams*, the defendant claimed that certain testimony by a law student, who had appeared as his counsel at an earlier criminal hearing, was privileged and should not have been admitted at his sentencing hearing.¹⁰ The law student had provided testimony concerning defendant Williams's demeanor during a pre-hearing meeting at which confidential communications may have occurred.¹¹ The court concluded that the testimony about the client's demeanor was not privileged because the meeting occurred in a courtroom where other people observed the client, and none of these observers were alleged to be agents of either the legal representative or his client.¹²

If it had desired to provide guidance on who may be deemed a client's agent for the purpose of attorney-client privilege, the *Himmel*

9. *Himmel*, 533 N.E.2d at 794. The *Himmel* court stated, "We have held that information voluntarily disclosed by a client to an attorney, in the presence of third parties who are not agents of the client or attorney, is not privileged information." *Id.* (citing *Williams*, 454 N.E.2d at 220).

The *Himmel* court also based its conclusion that the information regarding Casey's misconduct was not privileged on the fact that Forsberg intended for Himmel to discuss Casey's misconduct with the insurance company involved in the underlying personal injury action, with the insurance company's lawyer, and with Casey himself. *Id.* The court held that this intended disclosure destroyed the privilege pursuant to the rule laid down in a previous decision, *People v. Werhollick*, 259 N.E.2d 265 (Ill. 1970), which held that "matters intended by a client for disclosure by the client's attorney to third parties, who are not agents of either the client or the attorney, are not privileged." *Id.* Thus, the *Himmel* court reasoned that "under *Werhollick* and probably *Williams*, the information was not privileged." *Id.* See *infra* notes 10-12 and accompanying text.

10. *Williams*, 454 N.E.2d at 224, 239. The law student in *Williams* was authorized to appear in court for limited purposes under Illinois Supreme Court Rule 711. *Id.* at 240. The court assumed for its purposes that the attorney-client privilege extended to communications with this representative. *Id.*

11. *Id.* at 239-40.

12. *Id.*

court should have cited to *People v. Doss*,¹³ an appellate decision rendered one year before *Himmel*. In *Doss*, the defendant, an attorney convicted of perjury, complained on appeal that the trial judge had improperly denied his motion to compel production of a transcribed interview of his former clients, Eugene and Nancy Bloomingdale, by their new attorney, Kenneth Baughman.¹⁴ The perjury charges related to Doss's grand jury and courtroom testimony regarding how he came into possession of farmland previously owned by the Bloomingdales.¹⁵

The trial court denied Doss's motion to compel production, ruling that the interviews were subject to the attorney-client privilege, and that the privilege had not been waived even though two friends of the Bloomingdales, Jacquelyn Morris and Shirley Durbin, were present during the interviews.¹⁶ The appellate court noted that Baughman understood at the time of the interview that both Mrs. Morris and Mrs. Durbin "played a role in the Bloomingdales' affairs," were concerned about the Bloomingdales' relationship with Doss, and "solicited legal advice as to what recourse the Bloomingdales might have against" Doss.¹⁷ Additionally, the court noted that Mrs. Morris later served as the guardian of Eugene Bloomingdale's estate, and in that capacity, retained Baughman to sue Doss.¹⁸ There was also testimony from Baughman that Eugene Bloomingdale needed the assistance of others to obtain legal services.¹⁹ Further, it was uncontradicted that Mrs. Durbin was present during the interviews at the Bloomingdales' request and for the purpose of providing "moral support and encouragement to the Bloomingdales in obtaining legal advice."²⁰ This evidence led the trial court to conclude that the Bloomingdales were probably unsophisticated in the affairs of law, that they did not intend to waive the attorney-client privilege, and that "common sense" suggested that the presence of Mrs. Durbin should be allowed so that future clients would have support available during "particularly trying" periods.²¹

13. 514 N.E.2d 502 (Ill. App. Ct. 1987).

14. *Id.* at 503-05.

15. *Id.* Eugene Bloomingdale had previously inherited the farmland and had retained Doss to handle the probate of the estate in which the farmland constituted the primary asset. *Id.* at 504.

16. *Id.*

17. *Doss*, 514 N.E.2d at 504.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

The appellate court disagreed, reasoning that although Mrs. Morris may have been an agent of the Bloomingdales, there was no evidence that Mrs. Durbin was the Bloomingdales' agent or advisor.²² The appellate court noted that Mrs. Durbin herself had testified that despite Eugene Bloomingdale's "possibly low intelligence level," the Bloomingdales needed no help in communicating important information to their attorney.²³ The appellate court stated that although the sentiments of the trial court were "admirable," its ruling was contrary to Illinois law, under which "the presence of a third person [ordinarily] indicates a lack of intention that the communications of a client to his attorney are meant to be confidential."²⁴ The appellate court made it clear that in Illinois, a client may not employ an agent simply to provide moral support.²⁵

With its cursory reference to client agency, the *Himmel* court failed to discuss whether the "admirable" sentiments of the trial court in *Doss* should remain unsupported by Illinois law. Substantively, *Himmel* may in one sense affirm the Illinois Appellate Court's *Doss* decision by holding that under Illinois law a client's agent must do more than provide moral support and encouragement. The *Himmel* court, however, did not reexamine this policy, which the *Doss* trial court purportedly found to fly in the face of "common sense."²⁶ In addition to failing to address the concerns present in *Doss*, the *Himmel* court failed to articulate the circumstances under which family members and close friends might be deemed agents of clients. Procedurally, *Himmel* sheds no light on how Kenneth Baughman, James Himmel, or other Illinois attorneys can: (1) better assure their clients that a privilege will attach to attorney-client communications even though a third party is present, and (2) better advocate to a court that the attorney-client privilege has not been waived even though a third party was present during the communication.

When should family members and friends be deemed agents of individual clients during attorney-client communications? How should such agency issues be presented and resolved by the lawyers and judges confronting them? The following discussion offers a few suggestions.

22. *Doss*, 514 N.E.2d at 504.

23. *Id.* at 505.

24. *Id.* (citations omitted).

25. *Id.*

26. *Id.*

III. AGENTS OF INDIVIDUAL CLIENTS

The courts in both *Doss* and *Himmel* assumed that individual clients of attorneys may be accompanied by some form of "agent" during attorney-client communications, even though the courts concluded that such an agency did not exist under the circumstances.²⁷ A clear illustration of a client's agent is a person who facilitates dialogue by serving as a translator of language.²⁸ The appellate courts in *Doss* and *Himmel*, however, did not compare the role of such translators with the roles of Shirley Durbin or Tammy Forsberg's mother and fiancé. Had the court made these comparisons, the court would have recognized that the benefits that a client receives from the presence of a language translator are very similar to those received from close friends or relatives.

In *In re Busse's Estate*²⁹ the Illinois Appellate Court compared the role of a translator to that of a special companion who is present at attorney-client communications.³⁰ The court in *Busse's Estate* reasoned that an interpreter's presence at an attorney-client consultation is occasionally required by "reason of necessity," and thus would not automatically destroy the confidentiality of the consultation.³¹ The court also stated that at times an interpreter must be present at attorney-client conferences in order for counsel to obtain accurate information.³²

The *Busse's Estate* court went further, however, and suggested that a rule recognizing only an interpreter as a person whose presence is necessary would be "too narrow" because it would exclude the presence of other agents, who, in at least some instances, must be present at attorney-client conferences so that counsel may obtain accurate information.³³ The court determined that Helen Collins, a friend of Marie Busse, was present "as an agent, servant or employee" of Mrs. Busse during Mrs. Busse's consultation with her lawyer.³⁴ The court found it significant that Mrs. Collins provided care to Mrs. Busse, drove Mrs. Busse around in the Collins's car, and attended to Mrs. Busse's business affairs.³⁵ Consequently, the court concluded that the

27. See *Himmel*, 533 N.E.2d at 794-95; *Doss*, 514 N.E.2d at 505.

28. See *infra* text accompanying note 32.

29. *Collins v. Utley (In re Busse's Estate)*, 75 N.E.2d 36 (Ill. App. Ct. 1947).

30. *Id.* at 40.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Busse's Estate*, 75 N.E.2d at 41.

35. *Id.* at 37. One commentator agreed with the court's agency determination but argued that the communications were not privileged because they were not "connected with the legal business at hand." Note, *The Attorney-Client Privilege as Affected by*

consultation was not "out of the privileged communication rule."³⁶

Neither the *Doss* nor *Himmel* courts considered the holding of *Busse's Estate*, and thus never considered whether a similar approach may have been appropriate in those cases.³⁷ Outside of Illinois, however, courts and legislatures have employed approaches comparable to the one used in *Busse's Estate* when formulating client agency principles that would seemingly cover the companions in both the *Himmel* and *Doss* cases.

In *United States v. Bigos*,³⁸ the United States Court of Appeals for the First Circuit considered whether a father's presence during his son's conversation with an attorney vitiated the attorney-client privilege.³⁹ In *Bigos*, Dennis Raimondi appealed his criminal conspiracy conviction on the grounds that he was denied the use of a statement made by his alleged co-conspirator, Edgar McDonald, to McDonald's attorney.⁴⁰ In a brief discussion, the First Circuit reasoned that in spite of the prevailing rule that the presence of a third party destroys the attorney-client privilege, the client's communication was properly treated as privileged by the trial court because there was insufficient indication that McDonald and his attorney intended that their communications would not be confidential.⁴¹

The First Circuit revisited its *Bigos* holding in a similar case, *Kevlik v. Goldstein*.⁴² In *Kevlik*, the court again reasoned that the client's intention of confidentiality should be determinative on the question of whether attorney-client communications were privileged.⁴³ The *Kevlik* court characterized the actions of the client's father, who was present during the communications between his son and his son's attorney, as "normal and supportive."⁴⁴ Such supportive actions were of the same type that were characterized as "admirable" by the Illinois Appellate

Third Party's Presence, 15 U. CHI. L. REV. 989, 992 (1948).

36. *Busse's Estate*, 75 N.E. 2d at 41.

37. Although *Doss* cited *Busse's Estate* for the proposition that the presence of a client's agent will not destroy the attorney-client privilege, the *Doss* court did not consider whether Shirley Durbin may have served in a role similar to the one filled by Helen Collins in *Busse's Estate*. See *Doss*, 514 N.E.2d at 505.

38. 459 F.2d 639 (1st Cir. 1972).

39. *Id.* at 643.

40. *Id.* at 640, 643. Raimondi sought to use McDonald's statement to prove that he did not conspire with McDonald and others to hijack a truck and move stolen goods in interstate commerce. *Id.* at 643.

41. *Id.*

42. 724 F.2d 844 (1st Cir. 1984).

43. *Id.* at 849.

44. *Id.*

Court in *Doss*.⁴⁵

An approach comparable to the First Circuit's view is found in Section 952 of California's Evidence Code, which defines "[c]onfidential communication between client and lawyer"⁴⁶ as:

information transmitted between a client and his lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted, and includes a legal opinion formed and the advice given by the lawyer in the course of that relationship.⁴⁷

Any doubt that this definition would apply to Shirley Durbin and to Tammy Forsberg's companions is dispelled in the Law Revision Commission Comment⁴⁸ accompanying this section, wherein the legislative intent is described as follows:

The words "other than those who are present to further the interest of the client in the consultation" indicate that a communication to a lawyer is nonetheless confidential even though it is made in the presence of another person—such as a spouse, parent, business associate, or joint client—who is present to further the interest of the client in the consultation. . . . This may change existing law, for the presence of a third person

45. See *Doss*, 514 N.E.2d at 505.

46. CAL. EVID. CODE § 952 (West 1994).

47. *Id.* Both federal and state courts frequently use Proposed Fed. R. Evid. 503(a)(4), which is similar to § 952, as a guide in their decisions. See, e.g., *Suburban Sew 'N Sweep, Inc. v. Swiss-Bernina, Inc.*, 91 F.R.D. 254, 259 (N.D. Ill. 1981); *Strong v. State*, 773 S.W.2d 543, 552 n.11 (Tex. Crim. App. 1989). Although the United States Supreme Court proposed that Rule 503 be adopted, Congress chose instead to adopt the more general Rule 501, which covers all privileges generally. Commentators have noted that:

Questions as to the effect of the presence of persons other than the client and the lawyer often arise. . . . As to relatives and friends of the client, the results of the cases are not consistent, but it seems that here not only might it be asked whether the client reasonably understood the conference to be confidential but also whether the presence of the relative or friend was reasonably necessary for the protection of the client's interests in the particular circumstances.

CHARLES T. MCCORMICK, MCCORMICK ON EVIDENCE § 91, at 128 (4th ed., 1992) (footnotes omitted).

48. In 1965, the Commission recommended that the California legislature adopt an evidence code. During that same year, the legislature adopted a code provision similar to the one recommended by the Commission. The Official Comments of the Commission were adopted by the California Assembly and Senate Committees on Judiciary as reflecting the Committees' intent. *Foreword to CAL. EVID. CODE* (West 1966).

sometimes has been held to destroy the confidential character of the consultation, even where the third person was present because of his concern for the welfare of the client.⁴⁹

The "admirable sentiments" of the First Circuit and the California legislature should be incorporated into Illinois law by the Illinois Supreme Court. Although the First Circuit did not discuss principles of agency in its *Bigos* and *Kevlik* opinions, the First Circuit's approach suggests that the client's needs should be considered in determining whether attorney-client confidentiality is to be honored. Similarly, under the California approach, the question of whether the third party's presence is in the best interests of the client is crucial to determining whether the privilege has been preserved. To incorporate these principles, the Illinois Supreme Court need not overrule existing precedent. For instance, *Himmel* and *Doss* could be read to declare simply that a client's agent must do more than provide moral support and encouragement to the client.⁵⁰ The supreme court could clarify *Himmel*'s uncertainty by declaring that an agent's presence must be *necessary to the effective representation* of the client. Thus, the agent's presence must significantly enhance the attorney's opportunities to obtain accurate factual information from the client and for the client to understand any legal advice rendered by the attorney.⁵¹

Even if the Illinois Supreme Court were to recognize explicitly that the presence of a third party who significantly enhances effective attorney-client communications does not destroy confidentiality, attorneys must still decide which third parties might be eligible to attend attorney-client meetings. Though necessary for more effective communication, certain people may not be indispensable and might be excluded for other reasons. For example, even where a particular

49. CAL. EVID. CODE § 952, Law Revision Commission's Comment (West 1966).

50. Thus, a client's intent that the communication be kept confidential alone would not be dispositive. This view is consistent with Dean Wigmore's definition of the attorney-client privilege, upon which the Illinois courts rely. *See, e.g., People v. Adam*, 280 N.E.2d 205, 207 (Ill. 1972) (listing Wigmore's essentials for the creation and continuation of the attorney-client privilege (quoting 8 JOHN H. WIGMORE, EVIDENCE § 2292 (McNaughton rev. ed. 1961))). Wigmore wrote that waiver of the privilege is guided by elements of "fairness and consistency" as well as "intention." Specifically, he said: "A privileged person would seldom be found to waive, if his intention . . . could alone control There is always also the objective consideration that when his conduct touches a certain point . . . fairness requires that his privilege shall cease" 8 JOHN H. WIGMORE, EVIDENCE § 2327, at 636 (McNaughton rev. ed. 1961).

51. The view that necessity should dictate the existence of an agency relation within the context of the attorney-client privilege is not universally followed. *See, e.g., Michael G. Walsh, Annotation, Applicability of Attorney-Client Privilege to Communications Made in Presence of or Solely to or by Third Person*, 14 A.L.R. 4TH 594, 614-24 (1982) (reviewing the conflicting case law on the matter).

person's presence might in some ways enhance attorney-client communications, that person's presence might also pose dangers to effective representation of the client. Certain people may have their own general or particular biases, personal information or opinions about the relevant events, or financial interests in the outcome of the legal representation. Thus, even in a situation where a third party would enhance attorney-client communications, a lawyer may find that a certain person would not make a good agent for the client. In this situation, for the client's own protection, the client should be advised to find a different agent before attorney-client communications can begin or continue.

IV. ESTABLISHING AGENCY FOR INDIVIDUAL CLIENTS

In addition to recognizing that an individual client's agent may be anyone the client needs to insure that the client effectively communicates with the attorney and comprehends the attorney's legal advice, new guidance is needed so that attorneys can establish the grounds for agency before communications with clients begin in the presence of third parties. Such guidance would also be beneficial to attorneys seeking to preserve the privileged status of attorney-client communications when access to those communications is sought through pretrial discovery, trial testimony, or otherwise.

A. *Establishing the Grounds for Agency Before Communicating with a Client*

New Illinois precedent should recognize that an individual can be a client's agent during attorney-client communications if the grounds for the agency were established prior to the onset of communications involving professional legal services. A requirement that attorneys establish such grounds before communications begin would help insure that confidentiality was truly intended and reduce the possibility of after-the-fact attempts to recast communications as confidential. In the absence of such precedent, how could a Kenneth Baughman or a James Himmel go about establishing that a client's family member or other companion is needed for enhanced attorney-client communication and should thus be viewed as an agent of the client?

Initially, an attorney about to discuss legal affairs with an individual client in the presence of a third party should ask the client to identify the third party and to explain why the client has asked that party to be present. The attorney should generally instruct the client about the attorney-client privilege and about how the privilege may or may not be available if the third party is present only to provide moral support,

to satisfy her curiosity, to tell what she knows of the relevant events, or to evaluate the attorney for her own purposes. Should the client only generally indicate that the third party's presence would be helpful, the attorney should inquire further about the type of aid that the third party could provide. The attorney should explain the different consequences likely to follow if the third party's assistance involves an accounting of what she knows about the client's problems, rather than lending significant assistance to the client in speaking to and understanding the attorney. Once the attorney determines that the third party is likely an "agent" of the client under the previously described standard, the need to maintain confidentiality should be explained to both the client and the third party. Furthermore, the attorney should mention the risks associated with the third party's presence due to *Himmel*'s ambiguities. The attorney should also discuss other dangers, including the possibility of later disclosure of attorney-client communications by the third party and the possibility that such disclosure might destroy the privilege.⁵²

B. Advocating Agency When Compelled Disclosure Is Sought

Because attorney-client communications are often relevant to the issues in a case, and because *Himmel* is unclear on agency, an attorney who has established grounds for agency before rendering professional legal services in a third party's presence may nonetheless face a request to reveal the attorney-client communications. Opposing counsel will argue that the third party's presence demonstrates a lack of intent to maintain confidentiality. Attorneys in the situations faced by Kenneth Baughman or James Himmel would counter by urging that any presumption of nonconfidentiality due to third party presence can be overcome by showing that reasonable grounds for agency were established before communications began, and that the client thus intended confidentiality. Such attorneys should argue, in the words of

52. The attorney is responsible for adequately safeguarding against intentional and inadvertent disclosure; if she does so, at least "involuntary" disclosures may not undo the privilege. See *Suburban Sew 'N Sweep, Inc. v. Swiss-Bernina, Inc.*, 91 F.R.D. 254, 260 (N.D. Ill. 1981) (defining "inadvertent disclosure" as "where the information is transmitted in public or otherwise clearly not adequately safeguarded" and "involuntary disclosure" as "where the information is acquired by third parties in spite of all possible precautions"); cf. *Dalen v. Ozite Corp.*, 594 N.E.2d 1365, 1371 (Ill. App. Ct. 1992) (adopting a balancing test for evaluating whether a party waived attorney-client privilege that takes into account "the reasonableness of the precautions taken to prevent the disclosure").

Busse's Estate, that the third party's presence was required by "reason of necessity."⁵³

V. CONCLUSION

The Illinois Supreme Court's *Himmel* decision raised two dilemmas facing Illinois lawyers. On the dilemma concerning the tension between accommodating an individual client's desire for a third party's presence during attorney-client communications and preserving the privilege associated with those communications, the justices said little. The resulting uncertainties regarding who may serve as an agent of an individual client during attorney-client communications pose significant problems for Illinois judges and for Illinois attorneys representing clients who may have difficulty communicating. The Illinois Supreme Court should eliminate these uncertainties with new precedents which better define agency for individual clients and which better describe how such agency should be initially established and later preserved. "Common sense" suggests that individual clients of attorneys often face "particularly trying" times⁵⁴ and may require the presence of family members or friends during attorney-client communications so that professional legal services can be rendered effectively.

53. *Busse's Estate*, 75 N.E.2d at 40.

54. *See Doss*, 514 N.E.2d at 505.